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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES ALEXANDER, *et al.*,

Petitioners,

vs.

MARTHA SANDOVAL, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ROBERT C. JUBELIRER AND MATTHEW J. RYAN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Robert C. Jubelirer is the President *Pro Tempore* of the Senate of Pennsylvania. Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives. Both are parties to *Powell* v. *Ridge*, No. 98-1223, now pending in the United States District Court for the Eastern District of Pennsylvania, in which private plaintiffs have challenged Pennsylvania's state-wide school-funding policies under the federal Department of Education's Title-VI disparate-impact regulations. In an earlier decision in that case, the United States Court of Appeals for the Third Circuit held that those regulations support a private cause of action. *Powell* v. *Ridge*, 189 F.3d 387 (CA3), *cert. denied*, 120 S.Ct. 579 (1999). The viability of a private action under Title VI regulations is a dispositive issue in that case.*

SUMMARY OF ARGUMENT

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court held that a statute that does not explicitly provide a private right of action may nevertheless imply such a remedy in certain discrete circumstances. None of those circumstances exists here. Most important, there is nothing in the legislative history of Title VI to suggest a congressional intent that there be private actions to enforce disparate-impact regulations promulgated under the authority of Section 602.

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* Both Petitioners and Respondents have consented to the filing of this brief, and letters of consent are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amici* made a monetary contribution to the preparation of this brief.

Touche Ross & Co. v. *Redington*, 442 U.S. 560, 575 (1979) (legislative intent is the "central inquiry").

In addition to the conclusive legal analysis, there are compelling policy reasons for the Court to reject the invitation to find a private right of action in those regulations.

Both the structure and purpose of the regulations require that they be applied in the first instance by the agencies that promulgated them. Agency expertise and discretion are necessary to determine not only when a disparate impact has arisen, but whether the disparate impact is one in need of a remedy or is, instead, one that is justifiable and not in derogation of the regulatory purpose.

Without that initial agency review, the Title-VI disparate-impact regulations will be subject to both inappropriate application and abuse. The agencies have promulgated regulations that commonly lack any definition of discriminatory "effect," either qualitative or quantitative, and enunciate no justifications or defenses for even the slightest disparate impact.[1] Since it would be absurd for the agencies to have intended to prohibit even the slightest statistical anomaly in a grant recipient's program, these factors suggest the need for agency discretion in identifying appropriate cases to pursue. Furthermore, the regulations commonly contain detailed administrative procedures.

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[1] See the appendix of this brief, which is a table showing whether the disparate-impact regulations of 23 federal agencies (1) define discriminatory effect, (2) authorize any defenses, (3) allow private administrative complaints or (4) provide an administrative enforcement process.

This factor, when combined with the simultaneous breadth and vagueness of the regulations, evinces an understanding by federal agencies that the administrative process, followed by judicial review when appropriate, would be used to evolve standards of federal grant administration for disparate-impact cases, rather than private suits.

Finally, inferring a private right of action to enforce Title-VI disparate-impact regulations would wreak havoc on a great many state programs, in particular state funding initiatives. In attempting to meet disparate needs, state legislatures often make funding decisions that, without any intent to discriminate as to race or ethnicity, generate statistical anomalies that would facially suggest disparate impacts. Since no state is homogeneous either racially or ethnically, almost any attempt to address disparate needs can result in a statistical "disparate impact." To allow private challenges to those decisions without the filter of agency expertise and discretion invites a scenario in which the states are faced with the Hobson's choice of constant litigation or funding initiatives that are strictly *per capita* without any modification no matter how legitimate and pressing the need. The results of that dilemma cannot be helpful to the states or their citizens – including, ironically, those who have most fervently pressed private actions under the Title-VI disparate-impact regulations.

ARGUMENT

I. Introduction

Respondent Sandoval's suit was based on regulations of two federal agencies: 49 C.F.R. § 21.5(b)(2) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (Department of Justice), both of which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin."

These regulations are substantially identical to regulations promulgated between 1964 and 1980 by dozens of other federal agencies, ostensibly under the authority of Section 602 of Title VI of the Civil Rights Act of 1964. It is undisputed that Section 602 does not, on its face, provide for a private action for injunctive relief or damages.

Accordingly, the question for the Court is whether Section 602 implies the existence of a private right of action to address alleged violations of the regulations promulgated under it. The relevant initial inquiry is: (1) whether the plaintiffs are part of the class for whose "especial" benefit the statute was created; (2) whether there was any indication of congressional intent to create or to deny a private remedy; (3) whether the implication of a private remedy is consistent with the underlying purpose of the statute; and (4) whether the matter is one traditionally

relegated to the states. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[2]

Under each and every one of these criteria, the disparate-impact regulations fail to support a private right of action.

II. Section 602 and the disparate-impact regulations fail the *Cort* test.

Although, as noted, this Court has not yet addressed whether and how federal regulations may give rise to private actions, that issue need not delay the Court long in this case. Whatever test is applied, the result in this case is that the Section-602 disparate-impact regulations do not support private actions. We therefore briefly address the *Cort* factors as they apply to Section 602.

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[2] This Court has not expressly addressed the issue of when a regulation, as opposed to a statute, may give rise to an implied private action. Several of the courts of appeals have held that, if consideration of these factors suggests that the statute may give rise to a private action, the next inquiry is whether a particular regulation promulgated under that statute may give rise to a private action. The secondary inquiry includes two additional issues: (1) whether the agency rule is properly within the scope of the enabling statute; and (2) whether implying a private right of action will further the purpose of the enabling statute. *See, e.g., Angelastro* v. *Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (CA3 1985).

A. Neither the statute nor the regulations seek to benefit an "especial class."

In *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), Justice Stevens described the language of Section 901 of Title IX, which mirrors that of Section 601 of Title VI.

> Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case . . . this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case. . . . *Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large.*

441 U.S. at 690-91 n.13 (emphasis added). Section 601 enjoins intentional discrimination against any person on the basis of race or national origin. It is, in effect, an injunction to federal grant recipients against purposeful discrimination. *University of California Regents* v. *Bakke*, 438 U.S. 265, 284-85 (1978).

Section 602, by contrast, grants no similar right. Instead, it includes a command to federal agencies to promulgate regulations "to effectuate the provisions of [Section 601]. . . consistent with the achievement of the

objectives of the statute authorizing the financial assistance . . ." In a sense, Section 602 might be said to have the potential to benefit an "especial" class, *i.e.*, the victims of purposeful discrimination. However, Section 602 provides no substantive rights and is not self-executing. In contrast, therefore, with Section 601, it does not itself convey any benefit to any class. Rather, in the language of *Cannon,* Section 602 is a statute "that create[s] duties on the part of persons" (here the agency heads) "for the benefit of the public at large."

Moreover, it is implicit in the *Cort* test that the "especial" class must be one to which the plaintiff asserting the private right of action belongs. While agency regulations under Section 602 do, in part, address purposeful discrimination, they also go beyond it to prohibit unintentional effects of otherwise legitimate program administration.

B. Not only is there no indication of congressional intent to create a private right of action, there is a contrary indication.

Determining the intent of Congress is not only the second prong of the *Cort* test but also the "central" inquiry.[3] *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 575 (1979). There is nothing in the language of Section 602 that suggests that Congress intended there

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[3] This arguably should be the only prong, since, if Congress did or did not intend a result, why should any factor with less weight than a constitutional limit on congressional power frustrate its intent? *See Cannon,* 441 U.S. at 731 (Powell, J. dissenting).

to be private actions to enforce the resulting regulations.

Where a statute sets out remedies, a court should be reluctant to read others into it. *Transamerica Mortgage Advisors* v. *Lewis,* 444 U.S. 11, 19 (1979). Section 602 prescribes an *administrative* scheme for enforcement, including agency notice, an agency determination as to the insufficiency of voluntary means of securing compliance and a final agency report that must be filed with congressional committees. The various agency regulations provide more detail on the administrative process.

The legislative history is no more favorable to the idea that a private right of action should be inferred. When Congress enacted Title VI, legislators time and again made clear their understanding that Section 602 would not engender private actions: "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 CONG. REC. H2467 (Feb. 7, 1964) (Statement of Rep. Gill). "[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." 110 CONG. REC. S6562 (1964) (Statement of Sen. Kuchel). "Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill." 110

CONG. REC. S7065 (Statement of Sen. Keating) (March 23, 1964).[4]

The courts that have found a private action have looked at a sort of ersatz legislative history comprised of post-enactment statements taken out of context. *See, e.g., Chester Residents Concerned for Quality Living* v. *Seif,* 132 F.3d 925, 933-34 (CA3 1997). Of course, such references are not legislative history. *See Teamsters* v. *United States,* 431 U.S. 324, 354 n.39 (1977); *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750, 758 (1979).

In the end, the legislative history does not support the idea that Congress intended there to be private actions to enforce Title-VI disparate-impact regulations.

C. Inferring a private action would not be consistent with the underlying purpose of the statute.

The purpose of Title VI is to eradicate purposeful discrimination in programs receiving federal funds. *Bakke*, 438 U.S. 265 at 284-85. To infer a private action from the disparate-impact regulations as the Eleventh and Third Circuits have done ultimately does not serve that purpose. Moreover, it brings about a number of societal and policy problems Congress could not have intended. Those issues will be discussed in detail in the next part of this brief.

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[4] Senators Keating and Ribicoff had sought a provision in Title VI modeled after 42 U.S.C. § 2000a-3 that would allow private enforcement. Congress declined.

D. Implying a private right of action would intrude on areas traditionally relegated to the states.

The final prong of the *Cort* analysis asks if the statute intrudes into areas of traditional state authority. In the context of Section 602, the answer to that question is not readily apparent because the statute does not itself address substantive areas of the law but instead commands dozens of federal agencies to promulgate regulations to do so.

There are two ways to address this part of the *Cort* analysis. First, we can examine the particular regulation at issue, the Department of Transportation's disparate-impact regulation, and its application in this case. There can be no dispute that licensing of drivers is and always has been a state function. Second, we can look at the enabling statute, Section 602. The fact that the provision provides a portal to dozens of regulations, a majority of which address functions traditionally relegated to the states, should counsel against inferring a private right of action.[5] Consider the cases in which

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[5] *See, e.g., Sandoval* v. *Hagan*, 197 F.3d 484 (CA11 1999) (driver licensing); *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F.3d 925 (3d Cir. 1997) (state permits affecting siting); *Powell* v. *Ridge*, 189 F.3d 387 (3d Cir. 1999) (school funding); *Ceaser* v. *Pataki*, 98 Civ. 8532, 2000 U.S. Dist. LEXIS 11532 (S.D.N.Y. Aug. 14, 2000) (school funding); *Campaign for Fiscal Equity, Inc.* v. *State of New York*, 86 N.Y.2d 307, 655 N.E. 2d 661, 631 N.Y.S.2d 565 (1995) (school funding); *Goshen Rd. Environmental Action Team* v. *United States Dept. of Agriculture*, No. 98-2102, 1999 U.S. App. LEXIS 6135 (CA4 1999) (siting of facility); *Tolbert* v. *Ohio Dept. of Transportation*, 172 F.3d 934 (CA6 1999) (placement of highway noise barriers); *New York City Environmental Justice Alliance* v. *Giuliani*, 214 F.3d 65 (CA2 2000) (locating and maintaining garden plots).

Section-602 regulations have been used by private litigants: driver licensing, public education, road construction and zoning – all are areas of traditional state authority.

Can it be said that all Section-602 regulations delve into areas traditionally relegated to the states? No. But it can be said that the majority do and that the invitation implicit in the statute itself should counsel against the inference of a private right of action.

E. Consideration of the secondary issues described by the courts of appeals also suggests there should be no private action.

As noted above, this Court has never indicated if and when a regulation can give rise to a private action. However, the analyses of each of the courts of appeals to examine the issue include the question of whether the regulation is within the scope of the enabling statute. *See, e.g., Angelastro*, 764 F.2d at 947.

In this case, the regulation exceeds the scope of the statute. This Court has held that Title VI itself proscribes only purposeful discrimination. *Bakke*, 438 U.S. at 287. In *Guardians Association* v. *Civil Service Commission of New York City*, 463 U.S. 582 (1983), several members if the Court questioned whether disparate-impact regulations could be within the scope of such a statute. 463 U.S. at 611 n.5 (Powell, J., concurring) ("Administrative agencies do not have – and should not have – such lawmaking power."); 463 U.S. at

613 (O'Connor, J., concurring) ("it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory effect. Such regulations do not simply "further" the purpose of Title VI; they go well beyond that purpose.").

The regulations do not merely treat disparate impact as potential evidence of intentional discrimination that would violate Section 601. On their face, the regulations categorically prohibit disparate impact, even if unintended and justified by other program objectives.[6]

Because the validity of the regulations is now relevant to the question of the existence of a private right of action, the Court should follow Justice O'Connor's reasoning in *Guardians*. It will lead to the conclusion that the Department of Transportation regulation at issue in this case, at least in so far as it purports to prohibit unintentional disparate impacts, exceeds the scope of the enabling statute.

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[6] This can result in plaintiffs who may have a legitimate case of intentional discrimination in violation of Section 601 also pleading, as a backup theory with a lower burden of proof, a statistical disparate impact. *See, e.g., Rodriguez* v. *California Highway Patrol*, 89 F. Supp.2d 1131 (N.D. Ca. 2000) (racial profiling); and *Maryland State Conference of NAACP* v. *Maryland Department of State Police*, 72 F. Supp.2d 560 (D. Md. 1999) (same).

III. Title-VI disparate-impact regulations should be enforced by agency action rather than private action.

A. The structure of the regulations and the complexity of the necessary analyses require application of agency expertise.

Justice Marshall wrote 15 years ago in *Alexander* v. *Choate* that Congress intended that federal agencies would apply their expertise to determine which disparate impacts warrant attention under Title-VI regulations. 469 U.S. 287, 294 (1985). The Eleventh Circuit's decision allowing private actions to enforce Title-VI disparate-impact regulations ignores both the Court's admonition in *Choate* and the structure of the many Title-VI regulations themselves.

Most of the Title-VI disparate-impact regulations are based on a model promulgated more than three decades ago. That model categorically prohibits recipients of federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin . . ." *See, e.g.*, 49 C.F.R. § 21.5(b)(vii)(2) (Department of Transportation regulation). It does not define the sort of "effect" it prohibits and it does not offer any guidelines for determining when an "effect" can have incidental discriminatory impact, yet be justified. It is, of course, important to recognize that not all discriminatory "effects" should be unlawful or are undesirable. All laws discriminate, in the sense that choices are made about meeting different societal needs and prioritizing government action. Attempting to eliminate every

statistically disparate impact inevitably will, in some cases, not be "consistent with achievement of the objectives of the statute authorizing the financial assistance," which Section 602 requires the regulations to be. There ought to be an exercise of agency discretion to make that determination.

The determination can be complex. Consider the Environmental Protection Agency's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (the "Guidance"). The Guidance explains that the first step in an investigation will be to identify the affected population. The second step is to determine the demographics of the affected population by using "demographic mapping technology." The Guidance explains that "[i]n conducting a typical analysis to determine the affected population, [the Office of Civil Rights ("OCR")] generates data estimating the race and/or ethnicity and density of populations within a certain proximity from a facility or within the distribution pattern for a release/impact based on scientific models." The third step in EPA's investigation is to determine the universe of facilities and the total affected population. "OCR will determine the appropriate universe based upon the allegations and facts of a particular case." The fourth step requires EPA to determine if there is a disparate impact. The Guidance explains that "[s]ince there is no one formula or analysis to be applied, OCR may identify on a case-by-case basis other comparisons to determine disparate impact." The fifth step requires EPA to determine the significance of any disparity: "OCR will use trained statisticians to evaluate calculations done by investigators. After calculations are interpreted by expert opinion, OCR may make a *prima facie* disparate impact finding, subject to the recipient's opportunity to

rebut." In other words, at each step of the process, the EPA is to apply its technical expertise not only to determine if there is, in fact, a disparate impact but also to decide whether that impact is unlawful and undesirable.

The need for application of agency expertise is evident from the number of Title-VI disparate-impact regulations and the wide variety of issues addressed by their promulgating agencies. *See* Appendix.

Disparate impact, as contrasted to purposeful discrimination, is generally proven by resort to statistics. But almost every case presents the difficult question of which numbers should be compared to determine if there has been a disparate impact. Even in the more defined area of employment discrimination to which Title VII applies, the courts continue to struggle with what statistics are meaningful and how they ought to be compared. *See Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988). In the many varied and far broader circumstances presented in Title-VI cases, that struggle is magnified many times.

Consider *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *cert. vacated as moot*, 524 U.S. 974 (1998). In that case, a group of citizens of Chester, Pennsylvania, challenged the issuance of a state permit allowing a hazardous-waste disposal site to be located in their community. The population of Chester was approximately 65 per cent African-American. For procedural reasons, that case never proceeded beyond the pleading stage. But, had the residents ultimately been put to the test of proving disparate impact, how

would they have done so? And how would the district court have evaluated whatever statistical evidence the residents offered? Moreover, if the project's location were changed as a result of the litigation, how would it not have a disparate impact on a predominantly white or perhaps Amish population? The EPA Guidance described, *supra,* calls for a complex statistical and demographic study guided at each step by the agency's expertise. The Guidance, moreover, while providing a process does not provide substantive policy. Surely that analysis ought not first be performed by a federal trial court.

Even a strong proponent of private actions to enforce Title-VI disparate impact regulations has acknowledged the problem:

> Defining the relevant affected population groups and comparison groups is more complicated in an environmental siting case. Depending on the facts in a particular case and the type of pollution, the relevant populations could be those living within one mile of a facility, or several miles from the site. There are even more complex problems in measuring the risks of carcinogenic and noncarcinogenic pollutants.

Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions,* 73 TUL. L. REV. 787, 801 (1999). Such a determination is best made in the first instance by an administrative agency with expertise and experience in making those "complex" determinations about which populations to compare and the extent of perceived

risks. In a recent law review article, one EPA official acknowledged that the agency's definition of the terms of its Title-VI disparate-impact regulation is "fluid and living." Melva J. Hayden, *A Perspective on the Environmental Protection Agency's Title VI and Environmental Justice Programs,* 10 FORDHAM ENV. L. J. 359 (1999).

The need for agency expertise is heightened by the categorical prohibition in the regulations of any disparate impacts, without any facial allowance for degree or justification, or need to meet underlying program objectives. To the extent a given agency might find that a particular practice, despite producing a disparate impact, is justified, it must do so on an *ad hoc* basis. However, if jurisdiction lies solely within the agencies, absurd, counter-productive or program-disruptive results can be avoided, despite the simplistic language of the regulations, through the simple device of agencies exercising "prosecutorial" discretion.

However, if there is a private right of action, the duty of the federal courts to exercise their jurisdiction is mandatory in the highest degee. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 464 (1964). Since the right of action would be grounded in the regulations, how then would a court be justified in ignoring them, merely to avoid in some cases the "incorrect" result?

For example, state programs to assist children in poor families are likely to have a racially disparate impact in areas where poverty is concentrated among racial or ethnic minorities. Do non-minority children from affluent families have a claim of disparate impact, because poverty, very predictably, is a "criteri[on] . . .

which has the effect of subjecting individuals to discrimination because of their race . . ."? Under the categorical prohibition of the regulations, they would appear to have a claim. Must the state, therefore, both broaden and level its aid programs for children to avoid a statistically disparate impact? Or should the court selectively apply the regulations, in effect giving the regulations themselves a racial/ethnic disparate impact?

These dilemmas should be addressed, if at all, by the agencies that, lemming-like, adopted a perhaps well-intentioned but simplistic model regulation more than two decades ago and that have since offered virtually no substantive guidance.

Proponents of private actions to enforce the regulations have argued that courts should merely import the defenses and justifications from Title VII. This argument lacks a justification for ignoring the plain text of the regulations. It also inappropriately assumes that the defenses and justifications applicable in the employment setting can be imported wholesale into the myriad situations governed by the Title-VI disparate-impact regulations. For example, Title VII allows a defense that a particular practice reflects a *bona fide* occupational qualification. 42 U.S.C. § 2000e-2(e). As a practical matter, it would be essentially impossible to impress that standard on a Title-VI regulation. In the context of state-government programs and activities, asking a court to decide whether legislative determinations are justified invites both practical difficulties and separation-of-powers concerns. As the Court noted in *Washington* v. *Davis*, 426 U.S. 229 (1976), when it declined to extend

disparate-impact analysis to Fourteenth-Amendment claims:

> [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. at 248 (footnotes omitted). Of course, with regard to Equal-Protection issues, the Court has long deferred to state legislative efforts to remedy local problems. *See New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976). That deference is due in part to the federal judiciary's well-established respect for the coordinate role of state legislatures and the complex problems with which they contend.

In a Title VII case the underlying premise is that there should be equal reward for equal effort in the workplace. In contrast, many state spending programs affected by the Title VI regulations have as their underlying premise a policy decision to address disparate needs. Addressing disparate needs, except in a non-existent homogeneous state, inevitably produces statistically disparate impact.

Rather than a judicial re-writing of the regulations to make sense of them, the federal courts

should direct plaintiffs to the agencies themselves. The agencies will then be able to use their administrative complaint procedures to consider each allegation of disparate impact and to apply their expertise to resolving those claims on a case-by-case basis.

Consider, for example, the Department of Defense Title-VI regulation. If a person believes a recipient of Defense Department funds has used some "criteria or method of administration" that causes a disparate impact, he may file a written complaint with the Department. 32 C.F.R. § 195.8(b). The Department will then conduct a "prompt investigation" into the allegations of the complaint. § 195.8(c). If the investigator determines that there has been no violation, he must notify both the complainant and the fund recipient in writing of that determination. § 195.8(d). If the complainant disagrees, he may seek quasi-judicial review within the agency of the investigator's determination. § 195.12. If the investigator concludes that there has been a violation, the Department must first attempt to resolve the violation by informal means. § 195.9. If those informal efforts fail, the Department may either terminate its funding of the recipient or take other enforcement action, such as referring the matter to the Department of Justice for litigation. *Id.* Before the Department may terminate funding, it must afford the fund recipient notice and an opportunity to be heard. § 195.10. If the result of the hearing is adverse to the fund recipient, it may appeal to the Secretary of Defense. § 195.11. Finally, if the Secretary sustains the fund termination, the aggrieved fund recipient may seek judicial review in court. § 195.12. At each step of that detailed administrative scheme, there is an opportunity for notice and an opportunity to be heard

before agency officials with the expertise and experience to evaluate the evidence as it relates to the specific mission of that agency.

Implication of a private action would bypass that procedure. Thus, a federal court would be the first to determine (in what might well be a complex area of law) what "criteria or methods of administration" in fact cause disparate impacts and which are justifiable and therefore lawful. The court would be the first to make those determinations, despite the fact that the agency that promulgated the regulation giving rise to the suit ought to have far greater, and more specific, expertise and the fact that the agency has a well-defined process in place for making both determinations. And, of course, the agency process includes both a provision for a remedy and a provision for eventual recourse to the courts for judicial review. *See* 42 U.S.C. § 2000d-2; *see, e.g.*, 14 C.F.R. § 1250.110 (National Aeronautics and Space Administration regulation); *see also*, Appendix.

In its cases examining the doctrine of administrative exhaustion, the Court has recognized many of the same policy issues described in this brief. Even in cases in which the statute that provides the controlling law does not expressly require exhaustion, this Court and the lower federal courts often require exhaustion in order to insure that agencies exercise discretion, apply expertise and generate a factual record. Thus, in *McKart* v. *United States*, 395 U.S. 185 (1969), the Court explained that

> The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.

395 U.S. at 194 (*quoting* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-458 (1965)). Although this case does not expressly present an exhaustion issue, it squarely implicates the policy reasons underlying this Court's exhaustion jurisprudence.

IV. Allowing private actions to enforce Title-VI disparate-impact regulations wreaks havoc on governmental funding initiatives.

The practical effect of the Eleventh Circuit's decision in this case on states is enormous. States provide myriad programs and services. Each program or service involves communication by the state to participants or recipients. In most states, that communication is in English. In this case, the complainants are Spanish-speaking residents of Alabama. Had they been Farsi-speaking residents, or French-speaking, or Old-Church- Slavonic-speaking, the

result would have been the same (and the statistical anomaly even more pronounced).

The driver-licensing requirement at issue in this case is just one state function.[7] The Eleventh Circuit's decision invites disparate-impact suits because state troopers policing the highways speak English, because state tax forms are in English, because state bar exams are in English and because state highway signs are in English. These examples are nowhere near exhaustive. An application of Title-VI regulations that equates any statistical anomaly with unlawful state action would have widespread ramifications for every state or local government activity – even with regard to the narrow language issue presented in this case.[8]

Of course, the central *legal* issue presented in this case has implications far broader than the particular facts regarding Alabama's licensing system. Plaintiffs have, in the last decade, increasingly turned to Title-VI disparate-impact regulations to challenge

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[7] The fact that Alabama has chosen to codify its English-only requirement is of no moment. Most states at least unofficially communicate only in English and there is nothing in the Eleventh Circuit's decision, or in the regulation, that would distinguish between their informal practices and Alabama's codified practice.

[8] The issue here is not English versus other languages. The regulations could in theory affect the Commonwealth of Puerto Rico by requiring it to make special accommodation not only for English-speaking residents and visitors but for speakers of all other tongues, in all of its subsidized functions that are normally conducted in Spanish. This burden would be no more appropriate to impose than what is sought in this case.

everything from subway fares and school funding to driver licensing and environmental permitting.[9]

The General Assembly of Pennsylvania, for example, annually appropriates subsidies to 501 public school districts. The subsidy formula is based on factors that are facially neutral with regard to race and ethnicity. The formula changes from year to year but usually uses the previous year's subsidy as a baseline and then weighs the size of student population, the growth of population, the local tax-raising potential of a school district (including both the market value of local real estate and taxable personal income) and the number of students at poverty level. 24 P.S. § 25-2502.35. These facially neutral policies result in statistically disparate impacts on a variety of racial and ethnic bases in a very diverse state. For example, the school district with the largest minority student population in the state gets close to 150 per cent of the

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9 *See, e.g., Sandoval* v. *Hagan*, 197 F.3d 484 (CA11 1999) (driver licensing); *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F.3d 925 (3d Cir. 1997) (environmental permitting); *Powell* v. *Ridge*, 189 F.3d 387 (3d Cir. 1999) (school funding); *Ceaser* v. *Pataki*, 98 Civ. 8532, 2000 U.S. Dist. LEXIS 11532 (S.D.N.Y. Aug. 14, 2000) (school funding); *Campaign for Fiscal Equity, Inc.* v. *State of New York*, 86 N.Y.2d 307, 655 N.E. 2d 661, 631 N.Y.S.2d 565 (1995); *Goshen Rd. Environmental Action Team* v. *United States Dept. of Agriculture*, No. 98-2102, 1999 U.S. App. LEXIS 6135 (CA4 1999) (siting of wastewater treatment facility); *Tolbert* v. *Ohio Dept. of Transportation*, 172 F.3d 934 (CA6 1999) (placement of highway sound barriers); *New York City Environmental Justice Alliance* v. *Giuliani*, 214 F.3d 65 (CA2 2000) (locating and maintaining garden plots); *Rodriguez*, 89 F. Supp.2d 131 (racial profiling); and *Maryland State Conference of NAACP*, 72 F. Supp.2d 560 (same).

state subsidy that it would receive on a *per capita* basis. Likewise, the effect on many predominantly white, but affluent districts, is disparate, in that they get much less *per capita* from the state treasury, although white, rural but poor districts get more than the affluent districts.

No formula, other than a flat per student appropriation, could possibly avoid some disparate impact in Pennsylvania. The Commonwealth has both large urban centers and the largest rural population in the nation. It has large African-American and Asian (more recently including Vietnamese) racial minorities. It has unrivaled ethnic diversity, including not only its well-known Amish population, but Hispanic and Eastern European groups that still celebrate their distinctive heritages. Leveling the subsidy to avoid any statistical ethnic or racial anomalies would defeat the purpose of the subsidy.[10] Yet increasing one district's

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10 In *Powell*, the Third Circuit, in reversing the district court's dismissal of a disparate-impact claim concerning the state's school subsidy, said, "Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court order directing the state to equalize funding between these school districts would redress this comparative injury." 189 F.3d at 403. The court of appeals had before it only the complaint that had been dismissed and the statutory funding formula. It did not deal with the actual facts. If the district court, on remand, finds (as we are sure it will) that, contrary to the allegations of the complaint, the disparate impact of the state's funding formula favors non-white children over white children, could the district court ignore the mandate of the court of appeals, just because the plaintiffs would thereby get *less* money than they are

subsidy to placate a plaintiff group would only prompt another lawsuit from another school district because of the new disparity resulting from the litigation.

No scheme of taxation or distribution of state or local funds "has yet been devised which is free of all discriminatory impact." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 41 (1973). The Commonwealth's funding system – and the federal courts sitting in the Commonwealth – would be subject to a pendulum-like dynamic among the differing claims of various racial and ethnic groups, if private actions under the regulations are countenanced.

Almost every state funding initiative would be subject to the same challenge as Pennsylvania's education subsidy. For example, some states have programs to assist their less-fortunate citizens heat their homes in the winter.[11] Such a state subsidy, targeted as it must be to the state's most impecunious citizens, could almost certainly be subject to challenge for engendering some statistical anomaly. But is such a statistical disparity acceptable because of the greater good provided by the program? Common sense says

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presently receiving? Could the district court ignore the precedent of *Powell* if a largely white school district filed suit because it was in fact getting far less from the state? In adhering to the regulations, the court of appeals was indifferent to the state's struggle to deal with disparate needs. It shows how ill-suited the courts are for resolving the conundrums created by the agency regulations.

11 *See, e.g.,* Pennsylvania Supplemental Low-Income Energy Assistance Program, 62 P.S. §§ 3015, *et seq.*; *see also, Colorado low-income families to receive $23 million in home-heating aid*, Associated Press, Nov. 3, 2000.

that it should be, but the regulations make no exception for common sense.

Most states provide subsidies for health insurance for children.[12] Such programs typically provide greater benefit to members of minority groups.[13] The public accepts the disparity because it is a necessary means for the states to address their citizens' disparate needs. The regulations do not exempt such a program. The same could be said of state subsidies for public transportation and for school lunches (both disparately benefiting urban minorities, not suburbanites), for adult day care and many more.

This Court long ago recognized the mischief inherent in subjecting state fiscal programs to federal review.

> Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. . . . Appellees would have the Court intrude in an area in which it has traditionally

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12 *See, e.g.,* Pennsylvania Children's Health Care Act, 62 P.S. §§ 5001.102, *et seq.*; *see also,* Teresa Mask, *Advocates propose insuring 500,000 more across state,* Chicago Daily Herald, Oct. 13, 2000, at A11.

13 *Id.*

> deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause.

Rodriguez, 411 U.S. at 39-40. If the courts should be reluctant to interfere with state fiscal programs even when challenged as purposefully discriminatory, the courts should be doubly loathe to interfere when the only claim is of unintentional, statistical differences.

State and local governments make complex decisions all the time about how to allocate public funds. As Justice Powell wrote for the majority in *Rodriguez*, most expenditures by state and local governments are aimed at extending benefits to their citizens. 411 U.S. at 40. But every such expenditure invites a challenge that it was not enough or that it did not benefit the right people. This Court has long recognized the difficult decisions state and local governments face and has afforded them sensitivity and leeway in how they make those decisions.

The extension of a private right of action to enforce Title-VI disparate-impact regulations is at odds with that sensitivity. Allowing private actions to challenge those governmental decisions without the filtering effects of agency expertise, discretion and policy considerations would place state and local governments in an untenable position. Almost every decision made by state and local government actors would invite the same micromanagement by private lawsuit.

This Court has held that disparate-impact analysis is viable in the context of employment-discrimination cases *not* because it is appropriate to punish employers for statistical anomalies, but because statistics can sometimes provide a means for demonstrating with a high degree of certainty that a particular practice causes discrimination on the basis of race, ethnicity or gender despite the lack of any intent that it do so. *Watson*, 487 U.S. at 976-78. Even in the relatively narrow confines of employment cases, the Court has recognized that there is, in disparate-impact analysis, a risk of improper reliance on statistics and misguided presumptions about causation. 487 U.S. at 995-96; *see also, Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). For the reasons noted above (and many others), reviewing state and local government decisions about allocation of public resources through the lens of disparate-impact analysis requires a discerning eye and an appreciation of both the proper technical comparisons and of the circumstances when statistical disparities might be justified by other, valid considerations.[14]

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[14] In emphasizing the role of the administrative process, we are not conceding that the regulations are valid or enforceable even by the agencies or that any private complainant would have standing in the administrative process, but those are issues for another day. We also do not believe that the regulations overcome Eleventh-Amendment immunity in private actions, but that issue is not now before this Court.

CONCLUSION

Amici Robert C. Jubelirer and Matthew J. Ryan respectfully request that the Court reverse the decision of the Eleventh Circuit.

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APPENDIX

COMPARISON OF FEDERAL AGENCIES' DISPARATE-IMPACT REGULATIONS

Agency	Disparate impact/effect defined?	Defenses or justifications recognized?	Can private persons file administrative complaints?	Administrative enforcement process against grantees?
Dept. of Agriculture, 7 C.F.R. §15.1, *et seq.*	No	No	Yes	Yes
Dept. of Energy, 10 C.F.R. §1040.1, *et seq.*	No	No	Yes	Yes
EPA 40 C.F.R. §7.25, *et seq.*	No	No	Yes	Yes
HUD, 24 C.F.R. §1.1 *et seq.* and 24 C.F.R. §180.100, *et seq.*	No	No	Yes	Yes
Dept. of Commerce, 15 C.F.R. §8.1, *et seq.*	No	No	Yes	Yes
Dept. of Education, 34 C.F.R. §100.1, *et seq.*	No	No	Yes	Yes
Dept. of Defense, 32 C.F.R. §195.1 *et seq.*	No	No	Yes	Yes

App. 2

Agency	Disparate Impact/Effect Defined?	Defenses or justifications recognized	Can private persons file administrative complaints?	Administrative enforcement process against grantees?
DHHS, 45 C.F.R. §80.1, *et seq.*	No	No	Yes	Yes
Dept. of Interior, 43 C.F.R. §17.1, *et seq.*	No	No	Yes	Yes
Dept. of Justice, 28 C.F.R. §42.1 *et seq.*	No	No	Yes	Yes
Dept. of Labor, 29 C.F.R. §31.1 *et seq.*	No	No	Yes	Yes
Dept. of State, 22 C.F.R. §141.1, *et seq.*	No	No	Yes	Yes
Dept. of Trans., 49 C.F.R. §21.1 *et seq.*	No	No	Yes	Yes
Dept. of Vet. Aff's., 38 C.F.R. §18.1, *et seq.*	No	No	Yes	Yes
ACTION, 45 C.F.R. §1203.1, *et seq.*	No	No	Yes	Yes
Off. Personnel Mgt., 5 C.F.R. §900.401, *et seq.*	No	No	Yes	Yes

App. 3

Agency	Disparate impact/effect defined?	Defenses or justifications recognized?	Can private persons file administrative complaints?	Administrative enforcement process against grantees?
NRC, 10 C.F.R. §4.1, *et seq.*	No	No	Yes	Yes
NASA, 14 C.F.R. §1250, *et seq.*	No	No	Yes	Yes
TVA, 18 C.F.R. §1302.1, *et seq.*	No	No	Yes	Yes
AID, 22 C.F.R. §209.1, *et seq.*	No	No	Yes	Yes
GSA, 41 C.F.R. §101-6.2, *et seq.*	No	No	Yes	Yes
Nat. Found. Arts, 45 C.F.R. §1110.1, *et seq.*	No	No	Yes	Yes
Nat. Science Found., 45 C.F.R. §611.1, *et seq.*	No	No	Yes	Yes